

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 MICHAEL CLINGMAN, SECRETARY, :
4 OKLAHOMA STATE ELECTION :
5 BOARD, ET AL., :
6 Petitioners :
7 v. : No. 04-37
8 ANDREA L. BEAVER, ET AL. :
9 - - - - -X
10 Washington, D.C.
11 Wednesday, January 19, 2005
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:02 a.m.
15 APPEARANCES:
16 WELLON B. POE, JR., ESQ., Assistant Attorney General,
17 Oklahoma City, Oklahoma; on behalf of the
18 Petitioners.
19 GENE C. SCHAEFFER, ESQ., Washington, D.C.; on behalf of
20 South Dakota, et al., as amici curiae, supporting
21 the Petitioners.
22 JAMES C. LINGER, ESQ., Tulsa, Oklahoma; on behalf of
23 the Respondents.
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P R O C E E D I N G S

(11:02 a.m.)

JUSTICE STEVENS: We'll now hear argument in
Clingman against Beaver.

Mr. Poe, as soon as you're ready, we'll hear
from you.

ORAL ARGUMENT OF WELLON B. POE, JR.

ON BEHALF OF THE PETITIONERS

MR. POE: Mr. Justice Stevens, and may it please
the Court:

This case today involves a conflict between
Oklahoma's semi-closed primary law and a rule adopted by
the Libertarian Party of Oklahoma which, contrary to that
State law, would allow the Libertarian Party to open its
primary elections not just to independent voters, but also
voters registered as members of other political parties.

The Oklahoma primary system simply requires that
a person who is registered as a member of that party may
only vote in that political party's primaries. If the
voter desires to vote in another party's primary, all that
voter must do is, within a reasonable time before the
elections, primary elections, approximately 7 to 8 weeks,
is disaffiliate from that first party and then reaffiliate
as a member of that second party, or if the parties so
chose to allow independents, he may registered as an

1 independent in order to vote in that primary.

2 JUSTICE O'CONNOR: Well, of course, I guess from
3 the standpoint of the Libertarian Party, it's kind of a
4 problem because a voter who wants to disaffiliate under
5 Oklahoma law with their -- their prior registration have
6 to do it basically 8 weeks ahead, at which time they don't
7 know if the Libertarian Party will even qualify for having
8 a primary. I mean, it just gives them a very impossibly
9 short window. If the time were reasonable, that might be
10 a different picture, but isn't that kind of burdensome?

11 MR. POE: Well, Your Honor, the practicality of
12 that matter is -- is that generally the parties are
13 notified 10 days/2 weeks in advance of the registration
14 deadline that they are being -- if -- being recognized as
15 a political party. Of course -- and that's if that party
16 has waited until the very last minute by statute in which
17 to turn in their petitions and try to get recognized. Of
18 course, those petitions could be turned in earlier, which
19 would allow them more time to do so. But the practicality
20 of the -- of --

21 JUSTICE SCALIA: If they're turned in earlier,
22 will they -- will they be ruled on earlier?

23 MR. POE: Yes, Your Honor. The Oklahoma statute
24 requires that the election board take a -- has 30 days, a
25 maximum of 30 days, in which to review the petitions,

1 verify the number of signatures and the authenticity of
2 those signatures, and then make a decision on whether to
3 recognize or not recognize the political party.

4 JUSTICE BREYER: I guess there's a difference
5 here between the interest of a small party and a large
6 one. A small party would like, if there is a deadline, to
7 be as close to the election as possible so voters have a
8 chance to get fed up with the two big parties.

9 (Laughter.)

10 JUSTICE BREYER: That's their chance. A big
11 party would like it to be further away because then they
12 can plan how their election campaign is going to be.

13 Has any of this been litigated below?

14 MR. POE: No, Your Honor. The -- the only
15 question that has really been litigated below is whether
16 section 1-104, which is the semi-closed primary law, is
17 burdensome on the association rights of the Libertarians.

18 JUSTICE KENNEDY: In line -- in line with
19 Justice Breyer's question, does the State of Oklahoma have
20 an interest in insulating major parties from competition
21 for members?

22 MR. POE: Not from insulating them from
23 competition, Your Honor, but the State of Oklahoma does
24 have -- it has a closed primary system. It has -- it has
25 an interest. And this Court has found that interest, as

1 recently as in Timmons, that it does have an interest in a
2 stable political system, which may be a two-party system.
3 As long as --

4 JUSTICE KENNEDY: So you have a -- the State has
5 an interest in protecting major parties from losing their
6 members and thereby weakening the two-party system by
7 benefitting a third party. I thought that's contrary to
8 the whole thrust of our holding in cases such as Anderson
9 and Celebreeze where third parties are entitled to special
10 protection under the First Amendment.

11 MR. POE: Well, Your Honor, since that time in
12 Anderson and as Timmons and other cases cite, if the
13 regulation is a neutral, nondiscriminatory regulation,
14 then it is a proper regulation as far as it is applied to
15 all the parties.

16 In regards to the requirement of registration,
17 change of voter registration, all of those are applied
18 equally across any -- any party, whether it be the
19 Libertarian Party, the Democratic Party, Republican Party,
20 or any other party which may be recognized at that time in
21 the State of Oklahoma.

22 And back to Justice Breyer's comments, the
23 period of 7 to 8 weeks prior to a voting -- to a primary
24 election is actually a very short time as compared, for
25 example, to Rosario which this Court --

1 JUSTICE KENNEDY: Well, even in presidential
2 elections, most people don't get interested until 4 or 5
3 weeks before the election. Everybody knows that.

4 MR. POE: Well, Your Honor, we -- this is not
5 the presidential primaries of which we're talking about.

6 JUSTICE KENNEDY: Well, I'm saying even in a
7 presidential primary. If they're local races, it -- it
8 takes longer. The public just tunes out until the last --
9 last couple weeks.

10 MR. POE: Well, the statutes in this -- or the
11 sites or the -- the elections themselves are close in
12 time, and -- and the statutes involving the petitioning
13 have all been looked at as -- as courts and have been
14 found that this is a close enough connection to the time
15 of the elections, that that time frame of petitioning and
16 getting the requirements for -- for petitions and the
17 State recognizing the political party all fit comfortably
18 within the confines of -- of constitutionality.

19 JUSTICE GINSBURG: Mr. Poe, the -- the district
20 court in this case rejected all grounds except one. It
21 rejected the raiding and swamping. It said that's what
22 the Libertarians want to expose themselves to. It's not
23 for a State to be paternalistic to protect them against
24 their own bad choices. But it said this request is
25 damaging to the majority parties, to the major parties,

1 because it poaches on their members. But there is not in
2 this litigation any major party that's complaining about
3 that. So if that is the rationale that the district court
4 went on, can this Court possibly oppose it when there is
5 nobody, as far as we know -- they haven't even come into
6 this case at this level, filing a friend of the Court
7 brief.

8 MR. POE: Yes, Your Honor. This Court can find
9 -- first of all, that the local Democratic and Republican
10 Parties were not named in -- in the action, and as to why
11 they were not in the action in lower courts I do not know.
12 But the State has its interests and has to protect those
13 interests whether those parties are involved in litigation
14 or not.

15 JUSTICE GINSBURG: Well, when you -- would you
16 say that the rationale on which the district court
17 rejected the Libertarian Party's claim was unsatisfactory?

18 MR. POE: No, Your Honor. Under Monroe before
19 this Court, I think the Court was looking to the
20 potential, the possibility, of course. And as to the fact
21 pattern we had at the trial court, it was a very minor
22 party wanting to -- or effectively poach voters from the
23 two major parties.

24 But you have to look at the entire statutory
25 scheme and not just how it would apply. It could be

1 applied by the Democrats or the Republicans.

2 But also more importantly, in Monroe this Court
3 clearly stated that a State does not have to wait until it
4 sees actual damage to its political or electoral system to
5 make reasonable decisions. In fact, this Court says the
6 States should have the foresight to make those reasonable
7 determinations in an effort to prevent those -- those
8 potential evils from occurring if the likelihood of -- of
9 that is there.

10 And the district court made very --

11 JUSTICE SCALIA: Mr. Poe, I -- I -- here I am.

12 MR. POE: Excuse me, Justice Scalia.

13 JUSTICE SCALIA: I suppose that if -- if I were
14 the party chairman of the Republican or Democratic Party,
15 I'm -- I might have defended your -- your State` system if
16 I had been named as a party, but if I were not named as a
17 party, I'm not sure that I wouldn't -- I wouldn't decline
18 to come in as an amicus, even though I'm interested in the
19 outcome simply because I don't want to alienate my
20 Republican members by depriving them of the freedom, if
21 they want to do it, to go vote. You know, it makes you
22 look sort of parsimonious, doesn't it, when you tell your
23 Republican members, I don't want you to vote in the
24 Libertarian primaries? I -- I don't think we can say that
25 it doesn't hurt the Republican Party or the -- or the

1 Democratic Party simply because they hadn't filed an
2 amicus brief.

3 MR. POE: I would agree, Your Honor. I -- I
4 think the -- the fact that they're not there -- here the
5 Court --

6 JUSTICE SCALIA: They are, after all,
7 politicians, aren't they?

8 (Laughter.)

9 MR. POE: And they do like to keep their party
10 members as happy as they can.

11 JUSTICE STEVENS: Mr. Poe, may I just focus in
12 on exactly what the injury is? Is the injury that they
13 vote with the Libertarians or that they don't vote with
14 their own party?

15 MR. POE: The -- the injury is twofold, Your
16 Honor. And -- and first, it is the fact that by them not
17 voting in the primary to which they have associated -- and
18 that is registering as a Republican or a Democrat -- if
19 they go to the polling place and at the last minute decide
20 to go and vote in the Libertarian Party primary, their
21 decision not to vote in the Republican primaries, when
22 candidates have been trying to -- to use voter lists
23 trying to get to their party members to vote --

24 JUSTICE STEVENS: But wouldn't it be precisely
25 the same injury if they just didn't like the Republican

1 candidate in that particular election, decided to stay
2 home?

3 MR. POE: Well, if they had already made the
4 decision to stay home, then they would not be voting for
5 the candidate, but they would also not be voting in
6 another party's primary.

7 JUSTICE STEVENS: But how -- how are they hurt
8 by the fact that rather than staying home, they decide to
9 cast a vote for a minority party candidate?

10 MR. POE: Well, the party is here because it has
11 the -- the possibility, for those who are not voting, of
12 changing the elections of the candidates. And I think
13 also by --

14 JUSTICE STEVENS: Well, it's very unlikely if
15 it's a party that is -- gets the small vote that this
16 party gets. But you -- no matter how small the vote is,
17 you still find the injury to the major parties because
18 they voted for the Libertarians or because they didn't
19 vote at all?

20 MR. POE: Well, because they voted either way of
21 voting -- or for voting in the Libertarians and -- and not
22 voting, they have changed and possibly have changed,
23 especially when they went to the --

24 JUSTICE STEVENS: Is there any evidence on the
25 question whether the -- the support for the major party

1 candidate is any smaller than it would have been if there
2 had been no Libertarian Party at all?

3 MR. POE: There -- there's nothing in the record
4 that supports any of that.

5 JUSTICE SOUTER: And -- and a very similar
6 question. Is there anything in the record that indicates
7 that those who would vote in the Libertarian primary are
8 the stay-at-home Republicans or the Republicans who would
9 otherwise have voted in the Republican primary?

10 MR. POE: There -- there is nothing in the
11 record. There was no type of polling. There was some --
12 some expert testimony as to the potential reasons for
13 people voting in a Libertarian primary such as purposeful
14 intent to do harm to Libertarians or walking in intending
15 to vote --

16 JUSTICE SOUTER: But that -- I mean, the
17 Libertarians are happy to have -- take that risk.

18 MR. POE: Yes.

19 JUSTICE SOUTER: It seems to me if we don't know
20 whether the -- the Republicans who are going to migrate to
21 the primary are stay-at-homes or Republican voters, the
22 State has no basis even to say whether in fact the harm
23 it's trying to prevent is going to be affected one way or
24 the other by its rule.

25 MR. POE: Well, I -- I think, Your Honor, there

1 -- there is a context or -- there is belief that it will
2 harm. And there's been no polling in this action, and
3 there's no -- there was only one other State that has a
4 open -- what we have termed in this litigation as a -- a
5 semi-open primary. And there's no data that has
6 effectively come out of their one primary that says why
7 people are not voting, why they're voting in one primary
8 or not or the effects of that. I can give you --

9 JUSTICE SCALIA: Mr. Poe, I -- I -- why do you
10 rely only upon the damage to the Republican and Democratic
11 Parties? I frankly don't care much about that, but I
12 might care a whole lot about damage to -- to Oklahoma's
13 system of election.

14 Why do you allow party designations? I suppose
15 it is because you want people to know that there are
16 candidates who are associated with particular political
17 views. And to allow a party to, in effect, come in and
18 say, we don't have any particular political views, we --
19 we just want to nominate, you know, whoever the most
20 people want to nominate, that just destroys the whole
21 purpose of -- of your system of allowing people to run
22 under a party label. What's the use of a party label?

23 MR. POE: And -- and, Your Honor, we -- we
24 provided that information and those interests to -- to the
25 district court. And those are interests the State has.

1 It is if a party is running as a party and if the State --
2 there -- there may be an interest in it. I'm not sure --

3 JUSTICE SCALIA: It -- if it's running as a
4 party, it should run somebody who -- who shares the views
5 of the people in that party, which is somebody who is
6 nominated by -- by the people in that party, or at least
7 those people, joined by others who are not affiliated with
8 another party. That seems to me to make a lot of sense.

9 And it seems to me to destroy that system if --
10 if you say, hey, we're -- you know, we -- we're going to
11 allow the Libertarian Party to say, you know, we don't
12 have any real views. We're just going to -- we want to
13 nominate somebody that most people like. So let the
14 Republicans come in, the Democrats come in. The only
15 thing we want is to win. We don't really care.`

16 MR. POE: That -- that is the premise, of
17 course, of the voter registration.

18 And -- and that goes back to another -- an
19 adverse effect on the State and the State's political
20 system is this Court has recognized -- it recognized it as
21 recently as Jones and it has recognized in other cases --
22 that there is a -- a party labeling or a party
23 identification that voters use in a general election. And
24 if the poaching of members have changed the -- any of
25 those party -- those messages from that party, then the

1 reliance is going to be misplaced by those party members
2 when they go. They go to vote for a Democrat. They see
3 the D or the R or the L.

4 And more importantly, in this case we're not
5 talking just about the Libertarian Party, the effect of
6 the Libertarian Party. It could very well the effects on
7 all of the political parties. In fact, that effect could
8 happen if the Democrats wanted to open theirs up and run
9 that effect on the Libertarian Party.

10 Another reason, especially that is specific to
11 Oklahoma, to help prevent party factionalism and party
12 splintering. In Oklahoma, when a new party is recognized,
13 a -- a potential candidate has the opportunity within 15
14 days of the party being recognized of changing his voter
15 registration. That can even be outside the parameters of
16 section 4-119.

17 In that instance, there is the potential and I
18 think the probability of this occurring is that -- let's
19 say there are four or five candidates who have announced
20 for the Republican nomination if they want to get their
21 nomination, and one of them decides I don't want to
22 compete against those others. A new party comes in. He
23 is excused from the 6-month disaffiliation requirement.
24 Within those 15 days, he can change to the Libertarian
25 Party in hopes of getting that nomination, get the party

1 support and the party structure. By that happening, you
2 then incur -- by allowing this party-option primary, then
3 that would promote party splintering, party factionalism.
4 And the manner of that individual going to the Libertarian
5 Party the day of the election without any prior
6 registration -- those Republicans who may have supported
7 him leave the Republican Party and start to choose that.
8 That's splintering that this Court has specifically said
9 is not only a legitimate, important State interest but is
10 also a compelling State interest to effect.

11 Poaching has the same effect as raiding. It is
12 a little different how it gets there, but it has the same
13 effect. And raiding has been determined to be even a
14 compelling State interest in this Court.

15 I would like to reserve the rest of my time.

16 JUSTICE STEVENS: That's fine.

17 Mr. Schaerr.

18 ORAL ARGUMENT OF GENE C. SCHAERR

19 ON BEHALF OF SOUTH DAKOTA, ET AL.,

20 AS AMICI CURIAE, SUPPORTING THE PETITIONERS

21 MR. SCHAERR: Justice Stevens, and may it please
22 the Court:

23 In the decision below, the Tenth Circuit stuck
24 -- struck down an election rule that has been adopted by
25 nearly half the States pursuant to their authority under

1 Article I, section 4 to prescribe the manner of holding
2 elections. In so doing, the Tenth Circuit in our view
3 made three fundamental errors that I'd like to address
4 briefly.

5 The first was the Tenth Circuit's per se
6 approach to determining whether the alleged burdens here
7 are severe. That's an extremely important issue, of
8 course, because to our knowledge, this Court has never
9 invalidated a State election regulation under the First
10 Amendment without first finding that the burden at issue
11 was severe. But instead of looking at that issue closely,
12 the Tenth Circuit, at page 15 of its decision, simply
13 assumed that a severe burden necessarily arises from any
14 regulation that, quote, restricts the options of parties
15 seeking to define the scope of their associational rights.

16 Now, one would have thought that it's for courts
17 to determine the scope of a -- of a party's associational
18 rights rather than -- than the party itself. But in all
19 events, that was the sum total of the Tenth Circuit's
20 analysis on the -- on the question of severe burden.

21 Now, the respondents cite that finding, but they
22 -- they make no attempt to defend that approach. They
23 argue instead that the burden here is severe because, at
24 bottom, Oklahoma requires a Republican or Democrat,
25 wishing to vote in the LPO primary, to -- to disaffiliate

1 from the party 2 months in advance. But that burden is no
2 more severe than others that this Court has found
3 constitutionally acceptable.

4 The burden on voters, for example, is less
5 severe than the burden this found -- this Court found
6 acceptable in Rosario, which was a -- a requirement, as
7 Mr. Poe mentioned, that voters, wishing to vote in a -- in
8 a party's primary, register as a member of that party some
9 8 to 11 months in advance.

10 The burden on the party is also less severe than
11 a burden that this Court found acceptable in Burdick which
12 is that a party wishing to qualify for a primary ballot
13 gather the necessary signatures, in that case 1 percent of
14 the voting population, 5 months before the primary. It's
15 2 months here.

16 And it's also similar to a burden that all the
17 members of this Court found acceptable in Burdick, which
18 was -- which was a requirement that a candidate wishing to
19 run on a nonpartisan primary ballot collect the necessary
20 signatures about 2 months before the primary.

21 And the message of these decisions -- and I
22 think it's fair to say the holding in Burdick -- is that
23 requiring participants in elections to take action a few
24 months sooner or a few weeks sooner than they might prefer
25 does not amount to a severe burden. And that's the only

1 real burden here. The LPO has to --

2 JUSTICE O'CONNOR: Well, I guess the one other
3 concern would be the timing in Oklahoma is such that the
4 -- the Republican or Democrat who wants to disaffiliate in
5 order to vote with the Libertarians has to do so at a time
6 before the State has decided whether to allow the
7 Libertarian Party on the ballot. So, you know, it
8 probably isn't burdensome to -- in principle, to have some
9 disaffiliation requirement, but does the State have to
10 allow enough time so that the decision can be made with
11 knowledge of whether the Libertarians are going to be on
12 the ballot?

13 MR. SCHAERR: Justice O'Connor, I -- I think
14 that's really up to the party. And I -- and I think that
15 gets back to my point about Burdick. Yes, there is a
16 deadline and if the LPO --

17 JUSTICE O'CONNOR: It just seemed to me that it
18 might be more burdensome on the voter in that situation.

19 MR. SCHAERR: Yes, I -- I think that's true, but
20 again, the burden on the voter depends on what the LPO
21 does. If the LPO marshals its resources, gets -- gets its
22 message out, determines who its candidates are going to be
23 or who its potential candidates are going to be in advance
24 of the filing deadline and in advance of the deadline for
25 filing a petition to become a recognized party, then the

1 voter will have ample time to make a decision. It's
2 really only if the LPO procrastinates that the voter is
3 put in that position. It's not really a function of the
4 -- of the State law.

5 JUSTICE SOUTER: Let me just ask you to look at
6 the other side of the equation. However we assess the
7 burden, we're assessing it in relation to the State's
8 interest. What is your best statement of the State's
9 interest here that you think is defensible?

10 MR. SCHAERR: Well, I think -- I think the
11 State's interest is what the district court found it to
12 be, and I think the -- the district court actually found
13 two interests, not just one. It found an interest in
14 avoiding poaching and an interest in promoting party
15 loyalty along the lines that Justice Scalia mentioned
16 earlier.

17 JUSTICE SOUTER: Do -- do you think the -- the
18 poaching argument stands up on any -- any empirical basis?

19 MR. SCHAERR: I do. And in fact, the -- the
20 district court at -- at page 49 --

21 JUSTICE SOUTER: May -- let me just add quickly.
22 I -- I realize, of course, there's going to be some
23 movement of voters, but do we have any idea whether the
24 voters who are moving are the ones who would otherwise
25 have stayed at home anyway and done nothing, merely

1 nominal Republicans as opposed to active Republicans?

2 MR. SCHAERR: Yes. We -- we do have answer to
3 that. That is implicit, first of all, in the district
4 court's finding that poaching would, in fact, made -- make
5 a difference in the -- in the outcomes of the elections.
6 He -- he made that finding very clearly on -- on page
7 49 --

8 JUSTICE SOUTER: Well, he found that the numbers
9 are such that they could, but did he find -- and I'm not
10 sure of this. Did he find that the actual people who
11 migrated would otherwise have voted differently so that in
12 fact it made a difference?

13 MR. SCHAERR: That is implicit in his finding.
14 He said the institution -- this is again on page 49. The
15 institution of a party-option open primary format in
16 Oklahoma, as sought by the plaintiffs, would likely affect
17 the outcome of some primary elections. That -- implicit
18 in that is the view that there -- there would be some
19 voting Republicans and voting Democrats that would be
20 moving to the LPO, not just the nonvoting Democrats and
21 Republicans.

22 Now --

23 JUSTICE GINSBURG: Was there a basis in the
24 record for making that finding?

25 MR. SCHAERR: Yes. Mr. Darcy's testimony, which

1 I believe appears at -- at page 63 of the joint appendix,
2 in that -- in that general area, anyway.

3 Now, poaching -- poaching is a concern and --
4 and a legitimate and important concern to the States for
5 three important reasons. I -- I might mention that in
6 Tashjian this Court mentioned in footnote 13 that a --
7 that an open primary could have disorganization effects on
8 the other parties, and poaching is one of those, as the
9 district court found. And -- and it's a concern for three
10 independent reasons.

11 First of all, the State has an interest in
12 preventing poaching because that helps protect parties
13 from spurned candidate candidacies which was one of the --
14 the Court in Tashjian identified Storer and Rosario as
15 examples of that. And -- and the -- the semi-closed
16 primary protects parties against that. For example, if a
17 candidate for the Democratic nomination felt that she
18 wasn't getting enough support from the party leadership
19 before the primary, she might form or join another party
20 and then try to take -- take her supporters with her into
21 that other party. And although Oklahoma allows the
22 candidate to switch parties in that circumstance, the --
23 the semi-closed primary and the 7-week period or 7- or 8-
24 week period, standoff period, if you will -- that period
25 protects the party from having its voters poached as a

1 result of a -- of a spurned candidate joining another
2 party.

3 The second reason that poaching is a significant
4 concern is that -- is that it can lead to efforts,
5 strategic efforts by -- by other parties to influence the
6 outcome of another party's primary. For example, suppose
7 we're in California in 2002 a few days before the
8 gubernatorial primaries there. The Democrats have already
9 decided that their incumbent, Governor Davis, will be
10 nominated, so they're looking ahead to the general
11 election. And they see two possible Republican
12 candidates, Reardon and Simon, to pull two names out of a
13 hat. And they conclude that -- that they have a better
14 chance of beating Simon than they have of beating Reardon.
15 Well, what can they do to affect the -- the outcome of the
16 Republican race?

17 One possibility, if the Republican primary is
18 open, is to raid it by having some Democrat switch
19 registration and go vote for Simon. And of course, the
20 Court has said repeatedly that States have an important
21 interest in -- in preventing that kind of behavior.

22 The other possibility is for the --

23 JUSTICE STEVENS: And that's not permitted in
24 Oklahoma, is it? That kind of behavior is not permitted
25 in Oklahoma.

1 MR. SCHAERR: That's correct.

2 JUSTICE STEVENS: Yes.

3 MR. SCHAERR: That's correct.

4 And the other possibility, though, is for the
5 Democrats to open their primary and to lure some of the --
6 some of the Reardon voters out of the Republican primary
7 through targeted advertising or direct appeals from the
8 candidate or something like that.

9 JUSTICE STEVENS: Well, neither of the major
10 parties has done that in Oklahoma, has it?

11 MR. SCHAERR: Not that I'm aware of, but -- but
12 it is -- but it is a plausible concern that a legislature
13 would have. And as Justice Scalia said, these --

14 JUSTICE STEVENS: But the question is whether
15 when a minor party like the Libertarians do it, is -- is
16 it going to have that effect.

17 MR. SCHAERR: Well, there -- there's another
18 scenario for -- in the California example, for example.
19 Take -- assume that the Democrats, instead of opening up
20 their own primary to Republicans, they strike a deal with
21 the Green Party such that the Green Party makes an effort
22 to peel off the Reardon voters out of the Republican
23 primary voting pool in California. That --

24 JUSTICE STEVENS: But the cost of that deal
25 would -- they'd also run the risk the Democrats would --

1 would migrate also if they made that deal.

2 MR. SCHAERR: It depends on how they ran -- ran
3 the campaign.

4 In all events, it's a -- it's a plausible
5 scenario and -- and one that the State is entitled to
6 respond to before it -- before it actually happens.

7 Now, the -- the third reason that poaching is a
8 problem is that --

9 JUSTICE STEVENS: I apologize for taking your
10 time with a question, but I'm afraid your time is up.

11 MR. SCHAERR: Thank you.

12 JUSTICE STEVENS: Yes.

13 Mr. Linger.

14 ORAL ARGUMENT OF JAMES C. LINGER

15 ON BEHALF OF THE RESPONDENTS

16 MR. LINGER: Justice Stevens, may it please the
17 Court:

18 The integrity of a political party should be
19 defined by the political party and not by the State.

20 The State interest that they have asserted here
21 and alleged is to prevent against draining, and draining
22 the State has defined as the inverse of raiding. Now,
23 raiding, of course, is the State preventing and keeping
24 out of a political party disloyal voters of another party
25 coming in for a purpose to hurt that party. Now, if

1 draining is inverse raiding, then the State is saying that
2 it has an interest in keeping in to a political party
3 disloyal voters. So the State is asserting and is at
4 cross purposes that it has an interest to both keep out
5 disloyal voters from a political party's primary and at
6 the same time keep in disloyal voters.

7 JUSTICE BREYER: Why is that inconsistent?

8 Because I mean, you're -- you're basically advocating that
9 the Constitution requires Alaska's rule, and I thought
10 that -- we got briefs on that, I think, in -- in the
11 previous case and a lot of other parties thought Alaska's
12 rule was not a wise rule, though that's up to Alaska. But
13 to think that the Constitution requires that is
14 surprising.

15 The interest they assert is just the one you
16 said --

17 MR. LINGER: And --

18 JUSTICE BREYER: -- that the Republicans, in
19 order to have their party work, have to be able to plan a
20 campaign for a stable group of voters. They have to know,
21 roughly, who is in their party, let's say, a week before
22 or 2 weeks before, some period of time before. And that's
23 the interest that Oklahoma is asserting. It has nothing
24 to do with you. It has do with -- and it has zero to do
25 with you if you had a rule for minor parties, frankly.

1 But if you can't get a rule for minor parties, special,
2 then you have to take it seriously I think.

3 MR. LINGER: Most States --

4 JUSTICE BREYER: What's your answer? What do
5 you respond --

6 MR. LINGER: Justice Breyer, most States have a
7 rule for minor parties. They don't treat, like Oklahoma
8 does, you're either a party or you're a nothing.

9 JUSTICE BREYER: The States do but to say that
10 the Constitution -- and I'm asking. You see, I'm not --
11 but I -- if I could figure out how in the Constitution you
12 had a special rule for minor parties, the interest that
13 they're asserting has very little to do with it. But I
14 don't see how you can have a constitutional rule that
15 would forbid -- allow you to open and drain, but wouldn't
16 allow the Dems to do the same as they've done in Alaska.

17 MR. LINGER: I think in -- in Alaska, of course,
18 right now there is a party option where all the parties
19 but the Republicans have opened the primary. They have a
20 blanket primary. The Republicans haven't and the
21 Republicans, of course, in Alaska happen to be the
22 dominant party. There seems to be a pattern in these
23 cases --

24 JUSTICE BREYER: Well, because they say -- what
25 they're thinking, I take it -- I don't know what they're

1 really thinking, but I imagine they could be thinking, no,
2 we don't want to open our primary. We'll run the risk
3 that our voters go over and vote for the Dems and like it
4 there and stay. We'll run that risk, but we don't want
5 them coming and raiding us. We think that's the bigger
6 risk.

7 MR. LINGER: And -- and that --

8 JUSTICE BREYER: And how can the Constitution
9 tell them that they can't make that judgment? That's
10 what's bothering me.

11 MR. LINGER: I don't think the -- I think the
12 Constitution -- and the Court has recognized that it is
13 legitimate to protect against raiding because we can all
14 suppose how disloyal voters coming into a party could hurt
15 it. But how about disloyal voters leaving a party?
16 Because these voters that would come in and vote in the
17 Libertarian --

18 JUSTICE BREYER: Go back to my interest, the one
19 I asserted --

20 MR. LINGER: Yes.

21 JUSTICE BREYER: -- which isn't that. It is the
22 interest in the Republican Party in Alaska saying to
23 itself we do not want our voters to go leave and vote for
24 the Democrats because we want a stable body of people 3 or
25 4 weeks before the election for whom we can plan. We

1 don't want to open ours because we don't want the raiding.

2 We want to keep --

3 MR. LINGER: And, Justice Breyer, that sort of
4 First Amendment view of your voters shows that the party
5 thinks that they own the voters. We hear this language
6 where the party is contributing voters or they're being
7 poached or it's a donor party. That shows a certain view
8 of the party and what they --

9 JUSTICE BREYER: No, no. It's not an ownership,
10 but you have a period of time. So you focus on the period
11 of time. They're saying, of course, up to X period of
12 time, they take their choice. Is this a fake thing, a
13 fake reason, the need to have a stable group of people for
14 whom you plan your campaigns? Now, is that a hoax or is
15 it flimsy or is it serious? What do you think?

16 MR. LINGER: I -- I think it is flimsy and I'll
17 tell you why because I think paternalistically the State
18 of Oklahoma is way off or the Republican Party, if they
19 thought that way in Alaska, would be off. If you really
20 think about it, a party, particularly at the general
21 election, wants its loyal voters to get to the poll.
22 Actually this would be a benefit to the Republican and
23 Democratic Parties in Oklahoma or the Republican Party in
24 Alaska because it allow them to find out which of their
25 voters had voted in their primary and which had defected

1 to another party. When they're sending out mailers or
2 doing phone banks or driving people to the polls, they're
3 going to want to take their loyal voters. So this will
4 actually serve to help them to identify some of their
5 voters who aren't loyal, and they won't want to bring them
6 in. So I'm saying that --

7 JUSTICE SCALIA: The -- the State -- the State
8 of Oklahoma doesn't want your party raided. And -- and
9 you say we don't care if we're raided. Come raid us. All
10 we want to do is win. It seems to me it -- it -- you
11 cannot apply the -- the maxim, *volenti non fit injuria*.

12 Oklahoma is saying to your party, you can't
13 welcome raiding. We don't want your party to be raided
14 whether you like it or not because that's what a party
15 system is. We've set up these elections that -- that have
16 party primaries and party systems on the assumption that
17 each party is going to have a certain -- a certain belief,
18 a certain philosophy, and to allow your candidate to be
19 elected by everybody simply destroys that system. Why is
20 that -- why is that so unreasonable that it's
21 unconstitutional?

22 MR. LINGER: Because it's -- it's not practical
23 on what happens. As Justice O'Connor pointed out in her
24 questions, there is such a limited time. The
25 Libertarians, as shown in the record in this case, have

1 never and continually do not have the time to build up a
2 voter pool. They have their supporters spread out among a
3 number of political affiliations because there's such a
4 little amount of time that you can register as a
5 Libertarian, unlike the vast majority of States.

6 I don't think anyone has ever accused the
7 Libertarian Party of not having a set philosophy on what
8 they stand for.

9 But the fact of the matter, this Court itself
10 has expressed skepticism about whether even party raiding
11 ever exists. People don't go out generally to vote
12 because they want to pick someone who's a bad candidate.
13 They want to vote for someone they feel proud of who
14 expresses their views. The people that the Libertarians
15 would appeal to would be Republicans and Democrats who
16 either weren't going to vote in their primary or those who
17 were very Libertarian oriented or people who would be
18 Libertarians if they had more opportunity under the law to
19 register as Libertarians. They're, in effect, marooned --

20 JUSTICE SCALIA: Weren't those --

21 MR. LINGER: -- over these other affiliations.

22 JUSTICE SCALIA: -- weren't those who would like
23 to nominate the Libertarian candidate who would attract
24 the most people from the other large party? Right?

25 MR. LINGER: Who would they attract? They would

1 attract Libertarian-oriented people who would be drawn by
2 their philosophy because the Libertarian Party, as with
3 most minor parties, is an ideological party. They take
4 positions oftentimes ignored by the major parties, and
5 that is one of the reasons that --

6 JUSTICE SCALIA: No, but -- but the candidate
7 mostly to attract people from one of the major parties is
8 the candidate that is -- is more likely to water down the
9 pure Libertarian message and be closer to the message of
10 the Democratic Party or the Republican Party. And --
11 and --

12 MR. LINGER: If you can tell --

13 JUSTICE SCALIA: -- people who come into your
14 primary may want to elect such a candidate so that the
15 Libertarian Party will be strengthened and draw votes away
16 from the other majority --

17 MR. LINGER: Of course, this Court, I think, has
18 recognized that raiding is not a legitimate concern for
19 the State that overcomes a party that would open up. And
20 that's what the district court so held. We go into the
21 inverse of draining and talk about the effect it would
22 have on the Republicans and Democratic Parties. I think
23 the -- the district court said several times in its
24 opinion that the results would be highly speculative. But
25 I say that the results would probably be to the benefit

1 because it would ensure major parties that they got a
2 nominee who was picked by loyal supporters of the party,
3 and what would be drained off would be disloyal supporters
4 who would rather be doing something else.

5 And that, of course, is the essence of
6 competition. We should not be worrying about protecting
7 the major parties from competition for ideals. This is --

8 JUSTICE GINSBURG: Do I understand your brief to
9 say that this constitutional rule that you are seeking
10 would be just for the minority party? I think you said in
11 your brief it doesn't follow like the night the day that
12 because the Libertarians must be allowed to do this by the
13 Constitution, therefore the Democrats and Republicans must
14 also have the option to invite anyone into their
15 primaries.

16 MR. LINGER: The finding of the Tenth Circuit
17 was, of course, that it applied to these plaintiffs under
18 these particular facts. And I think that's one thing to
19 remember, how cautious and conservative this Court and the
20 First Circuit in Cool Moose were. They didn't make a
21 broad-based rule, and I don't interpret this decision and
22 I don't interpret the teaching of this Court in footnote
23 13 in Tashjian is that we should come down and make some
24 bright line rule that's always going to say we have to
25 have a party-option open primary or not. We need to look

1 at the factors. I think there are very few States that
2 this would even apply to because, as we know, 21 States
3 don't even have political primary registration.

4 JUSTICE SCALIA: What facts? We -- we have to
5 evaluate it on the basis of each election? What is a
6 State legislator supposed to do when he votes for a -- an
7 election system? He's going to flip a coin trying to
8 figure out what the fact situation will be when this --
9 when this system finally gets before a court? Surely that
10 -- that can't be the test.

11 MR. LINGER: I do -- I do ask that the State
12 legislatures think about what they're doing. And as I
13 demonstrated --

14 JUSTICE SOUTER: Okay. But you -- you want them
15 to think and you want to leave the door open to their
16 making a distinction for these purposes between the major
17 parties and the minor parties, and I can't think of
18 anything more intrusive into the political process than
19 that. Coming from a Libertarian, I -- I get a sense that
20 I must misunderstand you, but I don't know where it is.

21 (Laughter.)

22 MR. LINGER: I'm saying that I -- I don't -- I
23 don't think courts should ever go out and look for cases
24 in advance. We look at the case that is --

25 JUSTICE SOUTER: No, but we are -- we have got

1 to look around the corner.

2 MR. LINGER: -- about the effects.

3 JUSTICE SOUTER: And -- and if you're issuing
4 the invitation to come up with a different rule for
5 Republicans and Democrats and Libertarians, I think you're
6 asking for trouble and we would be asking for trouble if
7 we accepted that invitation.

8 MR. LINGER: No. I'm -- and as I said before, I
9 think the political party should be the one that defines
10 its integrity --

11 JUSTICE BREYER: Then -- then if you say that --
12 I want you to just respond in detail to the questions that
13 I think Justice Scalia and Justice Souter were asking, as
14 I understand it, putting it dramatically, that if you win
15 this case, Alaska's system becomes the Constitution of the
16 United States. Now, that I know you think is not so, and
17 I want to know why.

18 MR. LINGER: Because, number one, first, let's
19 eliminate the 21 States that do not have political party
20 registration. They would not -- in fact, the -- the
21 problem that we're worried about here, draining, and --
22 and the problem is going to happen simply because people
23 in those States, like President Bush's Texas, are free
24 from election to election to go to any primary they
25 want --

1 JUSTICE SCALIA: That's the same as election
2 system -- that's the same as Alaska's system. Right? I
3 mean, it boils down to the same thing. It boils down to
4 an open primary, doesn't it?

5 MR. LINGER: Justice Scalia, I respectfully
6 disagree because Alaska, unlike Texas, has political party
7 registration. Also, they have a party option. And most
8 States that have political party registration, in fact,
9 have a sort of two-tier system where they recognize it
10 would be discriminatory to treat major parties and small
11 political parties the same. Most of them like, for
12 example, the amici States here of New Mexico, Maryland,
13 they have political conventions for their -- they
14 recognize that that is something that shouldn't be applied
15 to the smaller parties.

16 But Oklahoma, of course, mandates primaries.
17 The Libertarians of Oklahoma are forced to have primaries.
18 They're forced to live under what is the most restrictive
19 ballot access and ballot retention laws, which limits the
20 amount of time they could be on the ballot.

21 The voter registration laws, as was cited in the
22 record of this case, as the trial judge found, of the 29
23 States that have political party registration, essentially
24 26 of them have -- they have free and open registration.
25 There are very few that limit things across the board like

1 Oklahoma does, and that's what makes this case unique.

2 And I think the footnote 13 in Tashjian talked
3 about looking at the particular facts and circumstances.

4 I think this case gives the Court an opportunity to fully
5 expand on that footnote, the full footnote, of course, as
6 I cited in the brief for the respondents, and that is to
7 say that all these are factors when you're analyzing any
8 State. Is -- does it have political party registration?
9 Does it mandate primaries for even the little parties?
10 How much time is available to change your registration as
11 new parties come up?

12 The New -- State of New Hampshire, of course,
13 has found a way to deal with this problem, which Oklahoma
14 hasn't, which is that they allow new parties that are just
15 recognized. Where many voters didn't have the opportunity
16 to register in that party, they have an open primary.
17 That's one way to deal with it.

18 But the point is Oklahoma didn't even think
19 about that. As we pointed out in our brief, the sore
20 loser provision where you have to be affiliated with a
21 party for 6 months -- the legislature -- when the first
22 time the Libertarians got on the ballot 25 years ago, they
23 didn't even realize that there was no way you could be
24 affiliated with a party for 6 months because you couldn't
25 register with it.

1 And the law and the workings of all these
2 registration laws in Oklahoma, because they are so
3 restrictive, prevent the Libertarian Party to get in the
4 position that the major parties have because they simply
5 can't get their people registered and stay registered with
6 the Libertarian Party because they're constantly being
7 purged and they're -- the people are frustrated.

8 JUSTICE BREYER: Would there be a way --
9 suppose, for hypothetical purposes, the Court were to say
10 -- you got a ruling that said there is no rule in the
11 Constitution that forbids a State, as a general matter, to
12 forbid this cross registration, this jumping, for a
13 reasonable time. But a reasonable time has to take into
14 account the interests of minor as well as major parties.
15 Now are you foreclosed because of the circumstances of
16 this case from litigating whether 8 weeks is a reasonable
17 time and whether the disjunct between the period where you
18 become a party and that 8 weeks is unreasonable in the
19 circumstances or other specific things that you say work
20 to the disadvantage of the Libertarians?

21 MR. LINGER: I think that's something
22 reasonable, but in this case it is unreasonable because
23 you simply don't have the opportunity to register.
24 Remember this --

25 JUSTICE GINSBURG: I thought your case was you

1 want to appeal to people who don't want to register as
2 Libertarians and don't even want to be independent. You
3 want to appeal to people who are and want to be members of
4 the Republican or Democratic Party but have Libertarian
5 leanings, but they don't want to give up their party
6 affiliation.

7 MR. LINGER: That -- that is part of the appeal.
8 There are obviously some people simply because of family
9 tradition or it may help them with their job or because
10 the Libertarians are controversial, some people may want
11 to keep it quiet and don't formally affiliate other than
12 they might wish to vote. But our appeal and request was
13 not simply those people but to many people, the vast
14 majority of Oklahomans who never vote --

15 JUSTICE SCALIA: The last category could --
16 could register as independents. I mean, if they're
17 ashamed of -- of the L word, they -- they could just
18 register as independents. Right?

19 MR. LINGER: A person can do that, yes. And, of
20 course, independents are growing. I think, as you know --

21 JUSTICE GINSBURG: Yes, but that you could do
22 right now, and you say that's not enough. We want people
23 who are members of other parties and don't want to change
24 their party affiliation.

25 MR. LINGER: We would like -- first, when you

1 have competition in ideals and in politics, it's always a
2 continuing process, and they're hoping to win all these
3 people over. They don't want these people to stay in
4 other political parties, but they are opening it up
5 because they have such a limited period of time in
6 Oklahoma when people can formally affiliate with the
7 Libertarian Party or, for that matter, any newly
8 recognized party.

9 Think of it this way. When counsel was talking
10 about the Rosario case where you -- the -- the State was
11 allowed to have 8 to 11 months and the Court found that
12 was acceptable to change your registration or the older
13 case of Kusper v. Pontikes where the Court found that 23
14 months in -- in advance to change your affiliation was too
15 much, in Oklahoma, whether it's 23 months before the newly
16 affiliate party gets recognized or 8 to 11 months, you
17 can't register with that party. So if it was unreasonable
18 in Kusper v. Pontikes but was reasonable in Rosario, the
19 point is under either of those time periods, in Oklahoma
20 you can't register with a newly recognized political
21 party. So how can that be reasonable?

22 The Libertarians do not have the opportunity.
23 Newly recognized parties under Oklahoma law do not have
24 the opportunity to get their people in in time, to the
25 extent they could, as demonstrated in the record by States

1 of similar population like Kansas and Arizona and, as I
2 noted in the brief, Oregon where there are substantially
3 more --

4 JUSTICE SCALIA: What did -- what did you seek
5 in this action? What did you seek in this action? Did --
6 did you seek just more time to -- to register? I -- I
7 thought you -- you sought to overturn the -- the system
8 entirely and -- I mean, maybe you asked for too much.

9 MR. LINGER: As -- as to the Libertarians, we
10 asked that we have a party-option open primary, which I
11 think is acceptable, and it's what New Hampshire does.

12 JUSTICE SCALIA: So more -- more time might be
13 -- might be a good idea, but that wouldn't satisfy your --
14 your complaint here.

15 MR. LINGER: If you go -- if you go --

16 JUSTICE SCALIA: Your -- your complaint is no
17 matter how much time you're given --

18 MR. LINGER: The -- the legislature -- if -- if
19 the law is overturned and the Tenth Circuit is affirmed,
20 the legislature might go back in then and address the
21 problem and they might come up with some solution as they
22 did back in 1980 when it became apparent to them that they
23 had set up a system where Libertarian candidates couldn't
24 be candidates for State office because they couldn't be
25 affiliated with a party with 6 -- for 6 months. They made

1 the change that is set forth in the statute that allows 15
2 days after the party is recognized.

3 It might very well be that a possibility the
4 legislature could pursue that could solve this problem, a
5 problem created by the State of Oklahoma, would be to
6 allow a period of time after a party is recognized for
7 voters, not just candidates, but for people who just want
8 to vote in the primary to change. That might be one
9 solution.

10 Or it might be, as in the State of New
11 Hampshire, where they allow that if it's a newly
12 recognized party and we recognize that all these people in
13 the State never had the opportunity to register in this
14 party, then they will have an open primary there.

15 So I don't think there's one solution for this
16 problem, and I think when the law, hopefully, is held to
17 be unconstitutional as it applies to Libertarians, then
18 the Oklahoma legislature can come in and perhaps remedy
19 the situation then.

20 Now, this -- this case is one in which there are
21 some other factors that have to be considered, and that is
22 the importance that is put on First Amendment rights to
23 political association. The State of Oklahoma, contrary to
24 the brief of the petitioners, has not been overburdened
25 with minor political parties. It is a State in which only

1 in presidential elections, by petitioning, have parties
2 even been able to gain ballot status.

3 The State has also a very severe -- the trial
4 judge in this case found that the retention requirement of
5 10 percent for every general election for the top of the
6 ticket was very difficult. The finding was that the
7 registration here was among -- very limited and among the
8 most difficult.

9 And finally, the State has imposed, I think
10 unwisely, primaries on these small political parties.

11 But other than the Libertarians and the Reform
12 Party, there have been no other minor parties on the
13 Oklahoma ballot. In this situation, we have to say to
14 ourselves, as the trial judge in fact commented on, is
15 whether or not the law is simply the result of the
16 concerns of the major parties. I do not think that the
17 State legislature in Oklahoma went out of its way to try
18 to interfere with the rights of Libertarians. I just
19 think that they never really considered them, and that is
20 why this Court has said on a number of occasions that when
21 the rights of independent voters and small parties are
22 impacted by legislation, that this Court should exercise
23 more strict and careful scrutiny there because --

24 JUSTICE GINSBURG: But how does that square with
25 Timmons where this Court turned away a party that says,

1 we've got this candidate and she's running on a major
2 party ticket and she's happy to be on ours too? And the
3 Court there said the State can legitimately eliminate --
4 limit the candidate to one party affiliation. So if it
5 can limit the candidate to one party affiliation, why not
6 the voter?

7 MR. LINGER: Because that was a candidacy right,
8 what the candidate was going to do, and in that particular
9 case, this Court noted that the candidate of the
10 Democratic-Farmer-Labor Party had a choice. That
11 candidate could have chosen to be the candidate of the
12 new party or that he could stay, as he did, with the
13 Democratic-Farmer-Labor Party.

14 We don't have the choice here. They wanted to
15 have him be the candidate of both parties at the same
16 time. We recognize that the State may properly limit each
17 voter to a single nominating act, to a single vote, and
18 we're not asking that. We're not asking that the State
19 not be allowed to set reasonable times to let them know
20 about what we're going to do.

21 But in Timmons -- and I think Timmons is what
22 led the district court astray here was what was not
23 recognized was that there was a choice allowed in Timmons,
24 and there's not a choice here. If -- if this had been in
25 Oklahoma, in -- in that regard, there would have been no

1 way for -- there's no way for a voter who's in the
2 Republican or Democratic Parties who wants to vote in the
3 Libertarian Party because of the unreasonable deadlines to
4 change and because of the lack of opportunity, there's no
5 way that they can register. So they don't have the choice
6 to register as a Libertarian, as the candidate of the
7 Democratic-Farmer-Labor Party did in Timmons, to change if
8 he wanted to. He chose to stay in the major party. But
9 that is one significant difference with Timmons.

10 And also, of course, I couldn't -- I would also
11 want to mention that Minnesota is a State that has no
12 political party registration. So once again, the problem
13 and issues we're confronted with here could not occur in
14 Minnesota. But I think that's significant.

15 And there was -- there was nothing on any voter
16 that would have kept them from being able to vote for that
17 particular candidate in the general election. They were
18 going to be -- he was going to be on the ballot in the
19 general election. In this case, the voters that don't
20 have the choice that that candidate did in Timmons, they
21 are not going to be able to express their opinion on a
22 party that they would like to express an opinion in in
23 their primary. And I think that is a very important
24 distinction.

25 I think that oftentimes in the standard that the

1 court uses, that there is a difference, sometimes
2 depending on which particular judge writes the decision on
3 how a standard is explained. But in this case, it is, as
4 the Tenth Circuit said and as the district court
5 recognized, something that lies between this Court's
6 decision in Tashjian and this Court's decision in
7 California Democratic Party v. Jones. But in both those
8 cases, the Court recognized and called for exacting
9 scrutiny when a law was impacting a party's choice as to
10 how it wishes to choose its nominees. I do not think that
11 the rationale come up by mistake.

12 This thing about draining, taking -- keeping the
13 disloyal voters in the Republican and Democratic Party and
14 not letting them come over, whether they wouldn't have
15 voted at all, or whether they didn't have the chance to
16 register as Libertarians, or whether they simply are
17 inspired by the particular candidates, I don't think in
18 that situation that that is either a compelling interest
19 by the State and I certainly don't think it is rational.
20 And in fact, as far as being paternalistic, I think the
21 State is totally wrong there because I think this would
22 actually benefit the major parties.

23 But I am saying to you that this is limited,
24 under the Tenth Circuit's decision, to the facts in
25 Oklahoma. And in other States, what the States can say

1 there, if it comes up, is what is a difference between us
2 and Oklahoma on ballot access and ballot retention, on
3 voter registration laws, on requirements. Do we allow,
4 like a number of the amici States, to have our minor
5 parties select by political party convention? But all of
6 this --

7 JUSTICE SCALIA: What are the mici States? You
8 said this a couple -- what are mici States? Mici States
9 did you say?

10 MR. LINGER: The amici, amicus --

11 JUSTICE SCALIA: Oh, the --

12 MR. LINGER: -- amici.

13 JUSTICE SCALIA: Okay. I thought you were
14 saying mici.

15 MR. LINGER: Amici. Okay.

16 In any event, we ask that the Court, when it
17 fully considers this, under the particular facts and
18 circumstances in this case and the record, that the Court
19 will affirm the decision of the United States Court of
20 Appeals for the Tenth Circuit.

21 JUSTICE STEVENS: Thank you, Mr. Linger.

22 Mr. Poe, you have about 3 minutes.

23 REBUTTAL ARGUMENT OF WELLON B. POE, JR.

24 ON BEHALF OF THE PETITIONERS

25 MR. POE: I will try and be brief, Your Honor.

1 The important thing to remember, in regards to
2 most of respondents' argument today and in their brief, is
3 that the events and the hurdles they are challenging now
4 were -- have never been raised at any time prior to this
5 briefing and this hearing. The district court did not
6 make findings as to the difficulty of the ballot access or
7 the ballot qualifications. He merely set forth what those
8 were. The Tenth Circuit never even addressed anything in
9 regards to ballot access or ballot qualifications and in
10 relation to the need to open up a primary. And in the
11 complaint, at the joint appendix page 22, the specific
12 relief sought by the respondents is to have section 1-
13 104, which is the semi-closed primary section -- have it
14 declared unconstitutional. There's no mention of any
15 other relief sought. No other section, the election
16 primary scheme, or anything else mentioned in their
17 complaint. It's never been raised before and it's never
18 been addressed by any court and -- and should not be
19 addressed by this Court at this point in time. There are
20 no findings for this Court to rely on to review the
21 allegations that have been made today.

22 Where the district court -- or where the Tenth
23 Circuit did err specifically is they found, as a matter of
24 fact or as a matter of law, based on Jones and Tashjian,
25 that any infringement upon a party's ability to associate

1 is a compelling -- must -- is subject to strict scrutiny
2 and requires a compelling State interest. Jones
3 specifically says that is not the case. Tashjian implies
4 that that is not the case. And the cases since Tashjian's
5 time say a compelling State interest is not always the
6 appropriate test. You look to the injury and then you
7 look to the burdens.

8 In this case, the appropriate burden -- or the
9 appropriate injury is not severe. They are reasonable
10 restrictions placed on Oklahoma to maintain the integrity
11 of its political system and its election system. With
12 that, the restrictions on -- in the Oklahoma statutes are
13 reasonable restrictions that govern and control and
14 support important State interests.

15 For that reason, the Tenth Circuit was
16 incorrect. The district court was correct in its
17 analysis, and we would ask that this Court reverse that
18 decision and find that those statutes are constitutional.
19 Thank you.

20 JUSTICE STEVENS: Thank you, Mr. Poe.

21 The case is submitted.

22 (Whereupon, at 12:00 p.m., the case in the
23 above-entitled matter was submitted.)
24
25